

## Washington State Whistleblower Program

Updated October 25, 2002

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### **State Auditor's Office Summary of Provisions and Protections Chapter 42.40 RCW The State Employee Whistleblower Act**

The Whistleblower Act, enacted by the Washington State Legislature in 1982 and significantly amended by Chapter 361 Laws of 1999, provides an avenue for state employees to report suspected improper governmental activity. The Act does not authorize the State Auditor's Office to investigate personnel actions for which other remedies exist, such as employee grievances.

Any Washington state employee may report a suspected improper governmental action through the Whistleblower Program. This includes temporary employees, classified and exempt civil service employees and elected officials. The Act does not cover employees of state contractors.

**Under the 1999 legislation, the asserted improper activity(ies) must have occurred within one year of the filing of the assertion(s).**

### **How To File A Report Of Improper Governmental Activity**

Improper governmental activity is defined as any action by an employee undertaken in the performance of the employee's official duties which:

- Results in mismanagement or gross waste of public funds or resources.
- Is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature.
- Is of substantial and specific danger to the public health or safety.

Assertions of improper governmental activity must be filed in writing with the State Auditor's Office. They can be reported using the Whistleblower Reporting Form, attached to this summary, or in a separate letter. In either case, the report should include:

- A detailed description of the improper governmental action(s).
- The name of the employee(s) involved.
- The agency, division, date and location where the action(s) occurred.
- Details that may be important for our investigation -- witnesses, documents and evidence.
- If you know it, the specific law or regulation that has been violated.
- Your name, home address and phone number.

Each assertion(s) should be noted separately and supported with as much specific information as possible. Supplying detailed information contributes to a thorough and efficient investigation. The Whistleblower Reporting Form is designed to help you supply the needed information.

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Assertions of improper governmental activity may be filed anonymously. However, including your name and number enables us to contact you to gather information that may be necessary for a thorough investigation.

Under state law, anyone who conducts a state employee whistleblower investigation must keep the whistleblower's name confidential. In addition, the law provides remedies for individuals subjected to retaliation as a result of their whistleblower activities and penalties for those who retaliate.

### **Send your Whistleblower Reporting Form or letter to:**

State Auditor's Office  
Attention: ED  
PO Box 40021  
Olympia, WA 98504-0021

If you wish to file assertions regarding the State Auditor's Office, please contact:

Evelyn Fielding  
Assistant Attorney General  
State Attorney General's Office  
PO Box 40108  
Olympia, WA 98504-0108  
(360) 586-3636

### **The Investigative Process**

Whistleblower investigations are conducted independently, objectively and thoroughly. It is the goal of the State Auditor's Office to treat all parties to the investigation, the state agency, the whistleblower and the subject, respectfully and fairly. Further, it is the goal of the State Auditor's Office to conduct all whistleblower investigations as timely as possible. On average, we try to have whistleblower reports issued to the public within 90 days and must have them completed within one year of receipt of the assertion or assertions.

The identity of the whistleblower is confidential throughout the investigative process whether State Auditor's Office investigators or others perform the investigation. Further, confidentiality is maintained even after the final report is issued. All working papers and final reports are redacted in responding to all public record requests to maintain that confidentiality.

The State Auditor is authorized to determine whether to investigate any assertions received.

### **Rights and Obligations**

Under the Act, the whistleblower, the subject of the assertion, the agency head and the State Auditor's Office have rights and obligations. They are:

**State Auditor's Office:** The State Auditor has a right to receive and investigate disclosures of improper governmental action. The Office analyzes and investigates assertions independently, objectively and thoroughly through interviews and by reviewing relevant documents. We maintain the confidentiality of the whistleblower and of witnesses who provide information during the course of the investigation. The Office dedicates adequate resources to investigate assertion(s) within the time frames spelled out in the law. Also within those time frames, the Office communicates the nature of the assertions and how they are being investigated with the subject of the assertion(s), the whistleblower and the agency head or designee. The Office documents each stage of the investigation in our working papers. The Office bases its reports on the conclusions in those working papers, and reports the results of investigations in a clear and understandable fashion. The Office refers cases to the appropriate ethics boards when we find reasonable cause to believe the code has been violated. The Office

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follows up on corrective action until the agency has taken appropriate action to resolve the matter.

**Whistleblower:** The whistleblower must file the assertions in good faith. Good faith is defined as a reasonable basis in fact for the assertion. Good faith is lacking when the employee knows or reasonably ought to know that the assertion is malicious, false or frivolous. Therefore, whistleblowers must make a reasonable attempt to determine the correctness of the information they furnish our Office. The whistleblower (if named) will be notified that we have received the assertion(s) and will be updated on the status of the case during the 30-day preliminary investigation and during the 60-day full investigation, if one is conducted. The whistleblower has a right to confidentiality and protection from retaliation. The whistleblower, agency head and the subject or subjects are notified at least annually of the status of corrective action until the State Auditor concludes that appropriate action has been taken by the agency.

**Subject of assertion(s):** Within the 30-day preliminary investigation, the subject has the right to be notified of the nature of each assertion, relevant facts known at the time and our intended course of action. Each subject shall be interviewed during the investigation. The same rights apply during the 60-day full investigation, if one is conducted. If we find reasonable cause to believe there has been improper governmental action, the subject will be given 15 working days to respond to the draft report. The subject's response, or portions of it, may be included with the final report, if appropriate.

**Agency director (or designee):** Within the 30-day preliminary investigation, the agency director or designee has the right to be notified of the nature of each assertion, relevant facts known at the time and our intended course of action. The agency director or designee must cooperate with the investigator and must preserve evidence in the case. The director or designee has the right to provide information relevant to the investigation. The same rights apply during a 60-day full investigation, if one is conducted. If we find reasonable cause to believe there has been improper governmental action, the agency director or designee will be given 15 working days to respond to the draft report. The agency response and plan for resolution, or portions thereof, will be included in the final report. The agency director or designee is responsible for taking corrective action when we find reasonable cause to believe improper governmental activity has occurred.

### Protection from Retaliation

The law requires that whistleblower identities be kept confidential. It makes retaliation unlawful and provides remedies for retaliation. Reports of asserted retaliation are filed with the Washington State Human Rights Commission. The commission will investigate the claim and take appropriate action. Civil penalties for retaliation may include a fine of up to \$3,000 and suspension for 30 days without pay.

For more information on the state Whistleblower Program, please call Jim Brittain at (360) 902-0372 or Britt Scott at (360) 902-0090.

### Protection of Whistleblowers Under the Law Against Discrimination

For more information on the protection of Whistleblowers, go to the link below.

<http://mrsc-web.mrsc.org/personnel/wb-retaliation.htm>

### Questions and Answers About the Whistleblower Program

#### **Q: What is the state Whistleblower Program?**

The State Employee Whistleblower program was created by the 1982 Legislature to encourage state employees to report assertions of improper governmental activity. The law makes retaliation against whistleblowers unlawful

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and authorizes remedies should it occur. The State Auditor's Office investigates and reports on disclosures of improper governmental activity and the Human Rights Commission has sole responsibility for investigating asserted retaliatory actions. The authorizing legislation for the program was amended in 1999 (Chapters 118 and 361, Laws of 1999).

### **Q: What are the primary provisions of the 1999 amendments to the law**

- A one-year statute of limitations. The asserted action must have occurred within a year of when it is reported. Timeliness is critical to gathering evidence, stopping improper governmental action and in holding public employees and officials accountable.
- The Auditor's Office has the sole discretion to determine how, or if, whistleblower assertions will be investigated. When making this determination, the following factors must be considered:
  - Correctness of information furnished.
  - The nature and quality of evidence and the existence of relevant laws and rules.
  - Whether the action was isolated or systemic.
  - The history of previous assertions regarding the same subject or subject matter.
  - Whether other avenues are available for addressing the matter.
  - Whether the matter has already been investigated or is in litigation.
  - The degree or significance of the asserted improper governmental action.
  - The cost and benefit of the investigation.
- Improvements in due process for all parties to the investigation. The measure requires our Office to communicate with the whistleblower, agency head and subject of the investigation at various stages of the process. All parties will be given an opportunity to respond to the draft report.
- Our Office must obtain the consent of an agency prior to referring whistleblower cases for investigation.
- A panel, including a citizen, will review and recommend whether to proceed with further investigation of anonymous assertions.

### **Q: What is improper governmental activity?**

The law defines improper governmental activity as any action by an employee undertaken in the performance of the employee's official duties which:

- Results in mismanagement or gross waste of public funds or resources.
- Is in violation of a federal or state law or rule, if the violation is not merely technical or of a minimum nature.
- Is of substantial and specific danger to the public health or safety.

### **Q: What precludes an employee from making a frivolous or false disclosure of improper governmental activity?**

Whistleblowers must file disclosures in good faith. The law defines good faith as a reasonable basis in fact for the communication. Good faith is lacking when the employee knows or reasonably ought to know that the report is malicious, false or frivolous. The law states that the identity of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith.

### **Q: Who can report improper governmental actions?**

Any Washington **state employee** may report suspected improper governmental actions through the Whistleblower Program. This includes temporary employees, classified and exempt civil service employees, and elected officials in all branches of state government. There is a separate program for local government employees, which is authorized under Chapter 42.41RCW. The state does not administer that program.

### **Q: Can employees of contractors with the state file a whistleblower disclosure?**

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No. Contractors and their employees are not covered by the State Employee Whistleblower Act. However, employees of contractors may report concerns about the handling of public funds to the State Auditor. These concerns can be addressed as part of the Office's audit process.

### **Q: Can whistleblower disclosures be filed regarding only employees in the whistleblower's own agency?**

No. Any state employee may file a whistleblower disclosure relating to any state agency.

### **Q: How do I file a whistleblower disclosure?**

Assertions of improper government activity are filed in writing with the State Auditor's Office. They are generally reported using the Whistleblower Reporting Form attached to this document. They also may be reported in a separate letter. In either case, the report should include the following:

- A detailed description of the improper governmental action(s);
- The name of the employee(s) involved;
- The agency, division and location where the action(s) occurred;
- When the action(s) occurred;
- Any other details that may be important for our investigation such as other witnesses, documents, evidence, etc.;
- The specific state law or regulation that has been violated, if you know it;
- Your name, address and phone number.

Avoid generalizations such as "Bob is always wasting public resources." Providing specific details about how and when "Bob" is wasting public resources will help focus the investigation, e.g., "Bob used his state computer to keep accounting records for his home business during working hours. This has been going on for a year."

Each assertion should be noted separately and supported with as much specific information as possible. Proving allegations can often be difficult. Supplying detailed information contributes to a thorough and efficient investigation. The Whistleblower Reporting Form is designed to assist you in supplying the needed information. Please use a separate Whistleblower Reporting Form for each assertion of improper governmental activity.

### **Q: Where should Whistleblower Reporting Forms be submitted?**

Mail your completed Whistleblower Reporting Form to:

State Auditor's Office  
Attention: ED  
PO Box 40021  
Olympia, WA 98504-0021

People wishing to file whistleblower disclosures regarding the State Auditor's Office may do so with the State Attorney General's Office:

Assistant Attorney General Evelyn Fielding  
P.O. Box 40108  
Olympia, WA 98504-0108  
(360) 58-3636

Please mark any whistleblower correspondence "Confidential".

**Q: Can a supervisor prohibit an employee from filing a report of improper governmental activity with the State Auditor?**

No. RCW Chapter 42.40.030 specifically prohibits direct or indirect interference with the filing of a whistleblower disclosure. It applies to all state employees. This statute also prohibits attempts at interfering with an employee providing information to the auditor during an investigation.

**Q: Does a whistleblower have to sign his or her name?**

Assertions of improper governmental action may be filed anonymously. Anonymous assertions will be reviewed by a panel to determine whether they will be investigated. The panel includes a state auditor representative knowledgeable of the subject agency operation, a citizen volunteer and a representative of the Attorney General's Office.

Including your name and number enables us to contact you to gather information that may be necessary for a thorough investigation. In many investigations this can be important. Under state law, anyone who conducts a state employee whistleblower investigation must keep the whistleblower's name confidential. In addition, the law provides remedies for individuals subjected to retaliation as a result of their whistleblower disclosure. A whistleblower is defined as anyone who provides information during the course of a whistleblower investigation.

**Q: Who has protection under the Whistleblower Program?**

Any state employee who provides information during a whistleblower investigation is provided the same protection as the whistleblower filing the disclosure with the State Auditor. The law also protects any employee who others believe filed a whistleblower report or provided information, but actually didn't.

**Q: What happens if a whistleblower believes he or she is being subjected to workplace reprisal or retaliation?**

The Whistleblower Program provides protections and remedies for retaliation. If you feel you are being retaliated against as a result of filing a disclosure, you may file a claim with the State Human Rights Commission. You also may wish to contact a private attorney for legal advice. A retaliatory action is any adverse change that affects your employment. Retaliation can take many forms, such as frequent job changes, office changes, unwarranted letters of reprimand or unsatisfactory performance evaluations. The Commission will investigate the claim and take appropriate action. It has the following toll-free numbers.

- Olympia 1-800-233-3247
- Eastern Washington 1-800-662-2755
- Seattle 1-800-605-7324
- TTY 1-800-300-7525

**Q: What are the provisions of the whistleblower retaliation law passed by the Legislature in 1999?**

The 1999 Legislature significantly enhanced protection of whistleblowers under the law against discrimination. Under the new law, any whistleblower subjected to workplace reprisal or retaliatory action is **presumed** to have established a cause of action for remedies administered by the Human Rights Commission. **Reprisal or retaliatory action** includes any one of 13 situations, including demotion, denial of employment, a coworker behaving in a hostile manner toward the whistleblower or a change in physical location of the whistleblower's workplace. The whistleblower's agency is authorized under the new law to **rebut the presumption**. The agency must prove with a preponderance of evidence that the action is independent of the employee's status as a whistleblower. The Human Rights Commission has more information on its process, including a one-page summary included with this packet.



**Q: What happens if the Human Rights Commission determines that retaliation has occurred?**

The Human Rights Commission may impose a civil penalty on the retaliator of up to \$3,000 and the retaliator may be suspended from work for up to 30 days without pay. At a minimum, a letter of reprimand is placed in the retaliator's personnel file.

**Q: Can the State Auditor investigate assertions involving personnel actions?**

The Whistleblower Act specifically excludes personnel actions for which other remedies exist from investigation by this office. These types of actions include, but are not limited to, employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of state civil service laws, labor agreement violations, reprimands or other disciplinary actions. While the Auditor's Office cannot investigate these types of assertions, there are other avenues for addressing them. The Office can, and will, look at systemic personnel issues or those where other remedies do not exist.

**Q: Which government agencies or other organizations can assist in addressing personnel issues?**

The following government agencies and labor organizations may assist state employees in dealing with personnel issues:

<b>Agency</b>	<b>Issues</b>
Washington State Personnel Appeals Board Olympia (360) 586-1481	Disciplinary actions. Layoffs. Violations of merit system rules. Violations of state civil service laws.
Washington State Human Rights Commission Olympia 1-800-223-3247 Eastern Wash 1-800-662-2755 Seattle 1-800-729-4960 TTY 1-800-300-7572	Discrimination because of race, creed, color, national origin, sex, marital status, age or disability.  Sexual harassment.  Whistleblower workplace reprisal or retaliatory action.
Public Employment Relations Commission Olympia (360) 753-3444	Unfair labor practices. Interference with rights to form or join employee labor organizations and rights to bargain collectively.
Washington Federation of State Employees Olympia (360) 352-7603	See grievance procedures in your union bargaining agreement.
Washington Public Employees Association Olympia (360) 943-1121	See grievance procedures in your union bargaining agreement.

**Q: How does the whistleblower process work?**

Whistleblower investigations are conducted independently, objectively and thoroughly. It is the goal of the State Auditor's Office to treat all parties to the investigation - the state agency, the whistleblower and the subject fairly

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and with respect. Further, it is the goal of the State Auditor's Office to conduct all whistleblower investigations as timely as possible. On average we try to have whistleblower reports issued to the public within 90 days and must have them completed within one year of receipt of the assertion or assertions.

A whistleblower investigation involves a five-step process. The identity of the whistleblower is confidential throughout the investigative process whether State Auditor's Office investigators or others perform the investigation. Further, confidentiality is maintained even after the final report is issued. All working papers and final reports are redacted in responding to all public record requests to maintain that confidentiality.

The State Auditor is authorized to determine whether to investigate any assertions received.

### Intake (5 Working Days)

- Analyze the assertion
- Determine whether the assertion appears to meet the definition of being an improper governmental action
- Evaluate the assertion taking into account the following factors:
  - Correctness of information furnished
  - Nature and quality of evidence
  - Existence of relevant laws and rules
  - Whether the action appears to be isolated or systemic
  - History of previous assertions regarding the same subject or subject matter
  - Whether other avenues are available for addressing the matter
  - Whether the matter has already been investigated or is in litigation
  - Seriousness or significance of the asserted improper governmental action
  - Cost and benefit of potential investigation
- Document intake analysis and establish planned course of action
- Acknowledge in writing to whistleblower receipt of the disclosure, the results of our intake analysis and any planned course of action, including whether a preliminary investigation will be conducted.

### Preliminary Investigation (30 Working Days From Receipt of Assertion or Assertions)

- Establish and document preliminary investigation strategy and plan
- Provide written notification as soon as practicable, but within 30 days, of the nature of the assertions to the agency head and subject, including:
  - The relevant facts and laws known at the time
  - Procedure for the subject and agency head to respond to the assertions and information obtained during the investigation
- Interview agency head or designee, whistleblower and subject
- Determine what other evidence needs to be gathered and how it needs to be obtained
- Determine who will conduct the preliminary investigation, which can include any one or more of the following:
  - State Auditor's Office investigators
  - State agency investigators (whistleblower agency, regulatory agencies, enforcement agencies, etc.)
  - Washington State Patrol
  - Contracted resources
  - Information technology specialists

\*Note: Agencies must give consent to a referral, and agree to abide by all aspects of the Whistleblower Act, including confidentiality and working paper standards.

- Document reasons for making any referrals
- Complete preliminary investigation field work
- Document preliminary investigation of each assertion, including:



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- Each assertion statement
- Relevant laws or rules
- Analysis of results of preliminary investigation
- Planned course of action, including no further investigation or that a full investigation will be conducted
- Have three-person panel screen preliminary investigation of anonymous assertions if a decision is reached that a full investigation should be pursued
- Exit with agency director, subject and whistleblower, providing an opportunity for review and input to the scope, methodology and conclusions
- If further investigation is to occur, provide written notification to the whistleblower, subject and agency head on or before 30 days from receipt of the assertion or assertions, including:
  - Relevant facts known at the time
  - Procedure to respond to the assertions and information obtained during the investigation
- Schedule full investigation and/or pursue other planned courses of action

### Full Investigation (60 Days from Receipt of Assertion or Assertions)

- Establish and document full investigation strategy and plan
- Establish deadlines, working to complete investigation within 60 days
- Provide written justification to the whistleblower, agency head and subject for any investigation that needs to extend beyond 60 days
- Determine what evidence needs to be gathered and how it needs to be gathered
- Determine who will conduct the investigation, which can include any one or more of the following:
  - State Auditor's Office investigators
  - State agency investigators (whistleblower agency, regulatory agencies, enforcement agencies, etc.)
  - Washington State Patrol
  - Contracted resources
  - Information technology specialists

\*Note: Agencies must give consent to a referral, and agree to abide by all aspects of the Whistleblower Act, including confidentiality and working paper standards.

- Secure and analyze evidence, including interviews of subject, whistleblower and agency director or designee
- Evaluate whether sufficient evidence supports reasonable cause that improper governmental action has occurred or not
- Complete investigation documentation
- Draft report and request for corrective action, if needed

### Draft Report and Corrective Action Plan (If Needed)

- Have legal counsel review all assertions where a reasonable cause determination has been made
- Exit with agency director, subject and whistleblower, providing an opportunity for review and input to the scope, methodology and conclusions
- Provide the subject and agency head 15 working days to respond to the assertions prior to the issuance of the final report
- If needed, solicit corrective action plan from agency director

### Final Report

- Issue final whistleblower report, incorporating responses and corrective action plan, if needed, from the agency director and subject
- Post whistleblower report on State Auditor's Office home page
- Make investigative working papers and whistleblower report available for public records requests as

needed

- Make enforcement referrals as needed

**Q: What do I do after filing a whistleblower disclosure?**

We recommend that whistleblowers not discuss disclosures with others, including family, friends and co-workers. Discussion of your whistleblower disclosure may jeopardize your confidentiality and could hamper the investigation.

**Q: Why is such a program important?**

Because this office is dedicated to ensuring accountability for public funds, we see the whistleblower program as one more method of achieving this goal. Public employees have an obligation to ensure that government in general, and their departments in particular, prevent improper governmental activity. The Whistleblower Program holds state employees accountable for their actions.

**Q: What are some examples of whistleblower disclosures where there has been reasonable cause to believe that improper governmental activity has occurred?**

- A state employee spent 338 hours using her state computer and other state equipment to engage in Internet chat room activities during work time at a cost to taxpayers of about \$8,850.
- A counselor physically and mentally abused children and staff at a state mental institution.
- An employee was drinking while using explosives and while operating a state vehicle.
- Workers at a state-operated group home were not properly controlling drugs. In one instance, a patient was given medication intended for another patient.
- A nonprofit contractor triple billed the state for services rendered and also billed the state for unallowable costs. This case caused the Legislature to authorize the Task Force on Agency Vendor Contracting.

**Q: What are the statistics for the Whistleblower Program?**

FY	Assertions Investigated	Reasonable Cause Determinations	Reasonable Cause Determination Rate	Enforcement Referrals
1998	268	91	34%	64
1999	205	62	30%	41

During fiscal year 1999 the State Auditor's Office received 205 assertions of improper governmental action. Of the total, we found reasonable cause to believe that improper governmental activity had occurred in 62 assertions, or 30 percent. Forty-one cases were referred to other agencies, such as the Executive Ethics Board, for follow-up action.

The downward trend in assertions has been evident over the past several years. We hope that trend continues and commend state agencies for taking actions that preclude improper governmental activity from occurring.

**Q: Who receives the results of a whistleblower report? Are they made available to the public?**

Unless the assertions were filed anonymously, the whistleblower receives a copy of the final report. People named in the assertions and agency officials also receive copies. The final report is a public record and is available to anyone who requests it. When appropriate, we distribute reports to agencies charged with enforcement. These agencies include county prosecutors, the state Attorney General's Office, the state Executive Ethics Board, the state Legislative Ethics Board, the state Office of Financial Management and

others. The final reports also are available on our home page <http://www.sao.wa.gov>.

**Q: What about suggestions on how agencies could be saving money? Should they be filed under the Whistleblower Program?**

No. Cost saving ideas should be submitted to the Brainstorm Suggestion Program, which is administered by the Productivity Board within the Secretary of State's Office, (360) 753-3174. Cost saving ideas can result in monetary awards.

**Q: Can local government employees file whistleblower disclosures with the State Auditor's Office?**

Under certain circumstances a whistleblower can report assertions involving local government to the State Auditor's Office. The Local Government Whistleblower Act, Chapter 42.41 RCW, requires each local government to have a policy in place that establishes an appropriate person to receive and investigate reports of improper governmental action. If the local government has failed to follow state law by not establishing a whistleblower policy, the whistleblower can submit a report to the county prosecutor's office. If the local government hasn't established a policy, and if an employee of the county prosecutor's office is named as the subject of the assertions of improper governmental action, then the whistleblower may file a report with the State Auditor's Office.

**Q: Do any other agencies participate in the investigations?**

If the assertions are criminal in nature, we may ask the Washington State Patrol to conduct the investigation. Other agencies may be asked for assistance depending on the assertion. For example, we request assistance from the State Archivist in cases involving public records. Any agency taking part in a whistleblower investigation is required to abide by confidentiality and documentation requirements.

**Q: If I have a question about the Whistleblower Program or a particular situation, how can I get technical assistance?**

Between 8:00 a.m. and 5:00 p.m. Monday through Friday you can call the State Auditor's Office and receive technical assistance.

- Britt Scott (360) 902-0090
- Jim Brittain (360) 902-0372

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